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6 Situated

7 **UNITED STATES DISTRICT COURT**
8 **FOR THE NORTHERN DISTRICT OF ILLINOIS**
9 **EASTERN DIVISION**

10
11 **IN RE: NATIONAL**
12 **COLLEGIATE ATHLETIC**
13 **ASSOCIATION STUDENT-**
14 **ATHLETE CONCUSSION**
15 **LITIGATION**

MDL NO. 2492
Master Docket No. 13-cv-09116
Judge John Z. Lee

16 **PLAINTIFF-APPELLANT'S OPPOSITION TO**
17 **IMPOSITION OF APPEAL BOND**

18 Timothy J McIlwain, counsel for the above listed parties, pursuant
19 respectfully opposes the imposition of an appeal bond, or an appeal bond in the
20 amount sought by settlement class counsel. An appeal bond in the sought amounts
21 by settlement class counsel would foreclose all but the wealthiest of litigants from
22 access to the courts.
23

24 **I. PRELIMINARY STATEMENT**

25
26 Counsel, Timothy J. McIlwain, ("McIlwain") was solicited by the Hausfeld
27 International LLC to assist them in their pursuit of lead counsel status in the
28

1 **A. The Amount Class Counsel Is Seeking As**
2 **a Bond Is Not Properly Included As “Costs.”**

3 HBSS has filed their motion pursuant to Fed. R. App. P 7. Rule 7 states, in
4 relevant part, “In a civil case, the District Court may require an appellant to file a
5 bond or other security in any form and amount necessary to ensure payment of
6 costs on appeal. Rule 39 states, that the costs taxable in the District Court consists
7 of:
8 of:
9 of:

- 10 (1)the costs of preparation and transmission of the record;
11 (2)the reporter’s transcript if necessary, to determine the appeal;
12 (3)premiums paid for a bond or other security to preserve rights pending
13 appeal and
14 (4)the fee for filing notice of appeal.
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16

17 In the case at bar, preparation of the record is minimal since it would
18 consist of Appellant’s fee applications, the court’s denials and the final judgment
19 which is already part of the appellate record.
20
21

22 There’s no necessity for preparation of a transcript. No bond for the
23 premium is necessary and the fee for filing the notice of appeal has already been
24 paid.
25

26 HBSS primarily relies upon *Heekin v. Anthem* , Inc. No. 1:05-cv-01908-
27 TWB-TAB to justify the imposition of the alleged additional administrative costs
28

1 that would be engendered by the appeal.

2
3 The reasoning in *Heekin*, however has been called into question by a case in
4 this district, *In Re Navistar Diesel Engine products Liability Litigation*, Case No. 11C
5 2490, MDL No. 2273, 2013 WL 4052673 (N.D. Ill. Aug. 12, 2013). In, *Navistar*,
6 Plaintiffs, similarly to HBSS, requested the court impose an appeal bond of
7 \$77,000.00 on one of the objectors to a class action. \$52,000 was alleged as
8 representing the “administrative costs of the delay caused by the appeal,” and
9 \$25,000.00 representing the direct taxable costs of the appeal. The court instead
10 imposed a bond of \$5,000.00 deeming it more appropriate. The court found the
11 Plaintiff’s estimate of the direct costs to be wildly inflated and the requested bond to
12 cover the alleged administrative costs that would be caused by the delay to not be
13 authorized by Rule 7.
14

15
16 In the case at bar, similarly to the Plaintiffs in *Navistar*, “[t]here is no
17 reasonable possibility that the expense of preparing transcripts (likely just the
18 preliminary approval and final approval hearings regarding the settlement), the
19 expense of duplicating the record, the expense of duplicating the briefs, and the
20 appellate filing fee will approach this amount. **Rule 7 is not intended to authorize a**
21 **court to impose a bond in order to deter or prevent an appeal.**” *2 As to the
22 administrative costs of delay,
23
24
25
26

27 Plaintiffs also cite decisions by a number of district
28 courts that have concluded, in situations like the
present one, that Rule 7 allows a court to require an

appellant to post a bond in an amount sufficient to cover extra administrative costs that a party otherwise would not have incurred. See, e.g. upon *Heekin v. Anthem*, Inc. No. 1:05-cv-01908-TWP, WL 752637 at * 1-2 (S.D. Ind. Feb. 27, 2013) [Accompanying cites omitted]. **This court, respectfully, does not find these decisions persuasive. None of them explains how a rule that expressly allows requiring a bond only to secure payment of recoverable costs (which under some statutes, included recoverable attorney's fees) can be read to authorize posting a bond to secure payment of expenses that are not recoverable costs.**

Ibid (Emphasis added.)

(Exhibit 1 in Opposition to HBSS's Motion for Imposition of Bond, hereafter "Exhibit").

B. The Four Factors That Determine Whether To Impose A Bond Militate Against Setting A Bond In the Instant Case.

In deciding whether to impose an appeal bond, the courts look at four factors:

(1) the appellant's financial ability to post a bond. In this case, McIlwain's ability to post a bond is extremely limited. (Attached please find a copy of McIlwain's 2018 tax return showing \$31,000.00 in income.) (Exhibit 2- entered under seal). Ironically, HBSS "presumes" McIlwain's financial ability to post their requested bond. HBSS has been diligent in opposing McIlwain's attempts to make a living in at least two other pending cases.⁴

(2) The risk of non-payment of appellee's costs if the appeal is unsuccessful.

As stated above it is highly unlikely that the taxable costs would exceed McIlwain's

⁴ McIlwain v. Brown, United States District Court Central District of California; 2:18-cv-05275-DMG-SKx; McIlwain, LLC v. Hagens Berman Sobol Shapiro, Northern District of California.

1 ability to pay.

2 (3) The merits of the appeal. The salient factor in the present case is that
3 there was no prejudice to any party by McIlwain's slight delay in submitting his
4 application for attorney's fees. Many larger fee issues had not been resolved. By
5 HBSS's own admission the court extended the time to allow counsel to produce
6 billing records to corroborate their fee applications. It's certainly arguable that those
7 fee applications were not completed by January 13, 2017, and if strict application of
8 the court's order was to be adhered to, the applications from the other counsel should
9 have been rejected as well.
10

11 (4) Whether the appeal is being brought in bad faith, or constitutes vexatious
12 conduct. HBSS is trying to piggy-back the issue of whether the appeal has merit, with
13 the issue of whether the appeal is being filed for vexatious reasons, or in bad faith.
14

15 In the sole case cited by HBSS, *Heekin v. Anthem , Inc.* No. 1:05-cv-01908-
16 TWP, WL 752637 (S.D. Ind. Feb. 27. 2013), the court found the appellant's class
17 action objector's appeal was brought for vexatious reasons, or in bad faith, when the
18 appellant was represented by an attorney who had not filed an appearance, had
19 previously applied to appear *pro hac vice*, but had withdrawn his application when the
20 court scheduled a teleconference. Furthermore, there was evidence that the attorney
21 was a serial objector.
22

23 In *Disability Rights New Jersey, Inc. v. Velez*, the court found the defendant
24 had filed frivolous defenses, when the defendant persisted in clinging to special
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1 defenses that had no application to the case. For example, defendant filed special
2 defenses stating that monetary damages were not chargeable to Defendant as a result
3 of contributory negligence, assumption of risk, third party intervention, failure of
4 proximate causation, and/or unavoidable circumstances. The plaintiff had not sought
5 monetary damages as relief in its complaint. It solely sought injunctive relief.
6

7
8 Compared to these two cases, McIlwaine's appeal could hardly be ruled to be
9 either frivolous, vexatious, or brought in bad faith. The Appellant is merely seeking
10 recompense for five years of effort that he undertook at the request of one of the lead
11 counsel in the case. The fee sought constitutes 0.0036 of the total fees awarded to
12 settlement class counsel.⁵
13

14 III. CONCLUSION

15
16 The most recent filing from HBSS in this case (Dkt # 572) argues that the
17 appeal from McIlwain should not affect the determination of an effective date for
18 implementation of the settlement agreement. This argument certainly seems to
19 undercut HBSS's claim for the necessity of an appeal bond to cover the costs of
20 delayed administrative expenses. Consequently, and for the reasons stated above,
21 Appellant respectfully requests this Honorable Court deny Settlement Class Counsel's
22 request for an appellate bond, or, if the court finds within its discretion that one is
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24
25

26 ⁵ This calculation does not include the fees awarded to objectors' attorneys. Even
27 opposing counsel, HBSS concedes that there's no evidence to support a finding that
28 appellant is acting in bad faith or committing vexatious conduct. (HBSS
Memorandum of Law pg.9).

1 necessary, the minimum amount that is appropriate to the case.

2 Respectfully Submitted,

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4 **McILWAIN, LLC**

5 BY: /s/ Timothy J. McIlwain

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Judge John Z. Lee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Imposition of Bond with the Clerk of the Court of the United States District Court for the District of Illinois, Eastern Division , by using the CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

(X) Certificate of service when all case participants are cM/ecf participants.

Dated: This ___Day of October, 2019.

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